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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 262

GROSS INCOME TAX DIVISION, INDIANA DEPARTMENT OF STATE REVENUE, STATE OF INDIANA, ET AL.,

Petitioners,

vs.

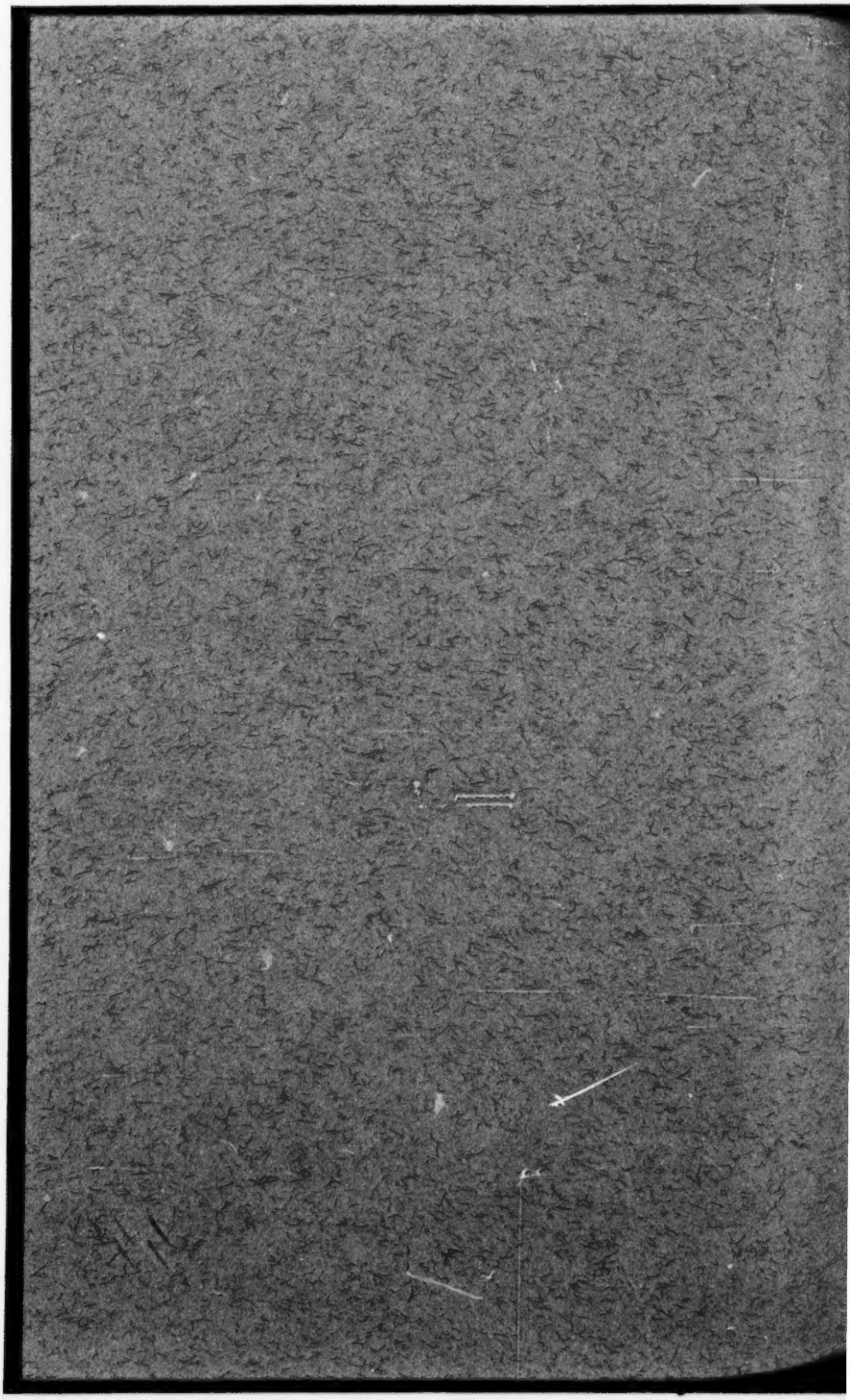
SURFACE COMBUSTION CORPORATION,

Respondent.

(Indiana Supreme Court Cause No. 29535)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

EDWIN K. STEERS,
Attorney General;
JOHN J. McSHANE,
LEOTIS C. HUTCHINSON,
EARL M. SCHREIER,
GEORGE R. HALL,
Deputies Attorney General,
State of Indiana,
Counsel for Petitioner.



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Respondent

(Indiana Supreme Court Cause No. 28835)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MAY IT PLEASE THE COURT:

The Gross Income Tax Division of the Indiana Department of State Revenue, of the State of Indiana, petitioner herein, respectfuly prays that a Writ of Certiorari issue to review the opinion, decision and judgment of the Supreme Court of Indiana, entered in the above-entitled case on March 19, 1953.

Summary Statement of the Matter Involved

The Nature of the Action

This action, commenced in the Marion Superior Court of Marion County, Indiana (19th Judicial Circuit of Indiana), and thereafter appealed to the Supreme Court of Indiana, is one to recover taxes assessed and collected under the Indiana Gross Income Tax Act of 1933, as amended. (Burns Indiana Statutes Annotated, 1951 Replacement, Volume 11, Part 2, Sections 64-2601 to 64-2635.)

The Facts

The facts are embodied in Special Findings of Fact entered of record by the trial court, and may be found in the record submitted herewith at pages 15 to 37.

So much of the facts as are necessary for a complete understanding of the questions herein presented, are as follows:

Respondent is a non-resident corporation (Finding No. 1, R. p. 16). It is not admitted or qualified to do business as a foreign corporation within the State of Indiana (Finding No. 3, R. p. 17). Its principal office, place of business, manufacturing plant and warehouse are located in the City of Toledo, Ohio, where its business, enterprise and manufacturing operations are conducted. At no time did it have a manufacturing plant or warehouse within the State of Indiana, nor did it have an officer, agent or solicitor in the State of Indiana authorized to enter into contracts in said State (Finding No. 6, R. p. 18). Respondent's business consists of manufacturing and selling heat treating furnaces for use in industry for the purpose of applying heat treating processes to castings, semi-finished and finished metal parts for use in machines, automobiles and other manufactured articles, and for the purpose of producing certain metal-

lurgical or chemical changes in connection therewith (Finding No. 22, R. p. 32). Said furnaces were of an intricate nature and contained moving parts and mechanism for the purpose of conveying material through the furnace, said heating operations and conveyers being automatically controlled (Findings No. 24, 25 and 42, R. pp. 32, 33, 37). Said furnaces were not designed or manufactured for or with reference to any particular building, but were machines performing a manufacturing function in industry, and were at all times chattel personal property (Findings No. 26, 36, R. pp. 33, 36). Whenever a purchaser of said furnaces (in this case Indiana purchasers) became interested in acquiring said furnaces, respondent made a study of the needs of the customer, selected a type of machine engineered and designed for the desired heat treating process and adaptable to the needs of the customer; thereupon respondent prepared and transmitted to the customer from its Toledo office, a proposal and specification to be accepted by the purchaser (Findings No. 32, 33, R. p. 35).

This contract provided for a lump-sum price to be paid as per schedule; said payment to be completed on or after the complete assembly and adjustment of said furnace at the Indiana site of the purchaser, and provided that title to said furnace and equipment should remain in respondent until payment of such price was made in full. The contract further provided that respondent would fabricate said furnace at its Toledo plant, and would ship said furnace from there to the plant of the customer in Indiana, generally f. o. b. point of shipment. It further provided, in the event that local assembly was required, that the respondent would assemble said furnace at the desired location in Indiana, the customer to unload and transport the same to such location at the customer's expense (Finding No. 35, R. p. 35).

The smaller furnaces were completely assembled at respondent's plant in Toledo, Ohio (Finding No. 27, R. p.

33). Because of their weight and size, the larger furnaces could not be transported to the Indiana purchaser completely assembled. In order to transport these furnaces to the Indiana plant of the customer, it was necessary to ship said furnaces partially "knocked-down", and to complete the assembling thereof at the Indiana plant of the purchaser Findings No. 28, 29, R. p. 34). Prior to the shipment and as required by contract, the Indiana customer provided a concrete foundation sufficient to support the weight of the furnace (Finding No. 26, R. p. 33).

In order that said furnaces, both larger and smaller, might satisfactorily perform their intended function, it was necessary for respondent, by its employees, to adapt and adjust said furnaces for use at the Indiana plant of the customer. With respect to the larger furnaces which were shipped in component parts, it was necessary that the assembly at the Indiana plant, together with adaption and adjustment of the furnaces, should be done by factory trained engineers, supervisors and workmen, who came into Indiana for that purpose (Finding No. 29, R. p. 34).

The foundation upon which the furnace was set was not recessed, but was on the floor level; said furnace was connected with gas pipes, water pipes and electric wiring, and was anchored at some point in the concrete foundation by nuts and bolts supplied by the customer and imbedded in the concrete floor. This was for the purpose, not of adding strength, but for preserving alignment and holding the furnace in place, due to the fact that heat and cold would cause the furnace to expand and contract. Said furnaces could be, and some times were, unbolted and moved to other places after installation and were not otherwise attached to the building (Finding No. 26, R. p. 33).

The average purchase price of said furnaces was $30,240.00 (Finding No. 30, R. p. 34).

The amount of money expended by respondent for salaries, wages and expenses of its employees while engaged in said work at the Indiana plant of the customer, varied according to the circumstances, but averaged 13.5% of the purchase price of the furnaces (Finding No. 29, R. p. 34). Upon completion of the assembly of the larger furnaces at the Indiana plant, and upon adaption and adjustment of all furnaces, both larger and smaller, acceptance by the customer in Indiana and payment in full of the said purchase price, respondent delivered said furnace to the Indiana customer and title to the furnace passed (Finding No. 40, R. p. 37).

With respect to the income derived from the performance of contracts with Indiana purchasers, as hereinabove summarized, the Indiana Supreme Court held that the imposition of the Indiana Gross Income Tax upon such income, or any part thereof, was invalid as being in conflict with Article I, Section 8, Clause 3 of the Federal Constitution, the Commerce Clause.

Opinion Below

The opinion, decision and judgment of the Indiana Supreme Court (R. p. 49), as yet unreported officially, is unofficially reported in 111 N. E. (2d) 50 of the West Reporter System.

Statute Involved

The statute involved is the Indiana Gross Income Tax Act of 1933, as amended (Indiana Acts of 1933, Chapter 50; Indiana Acts of 1937, Chapter 117, and succeeding amendatory acts), and may be found complete with amendments to date, in Burns' Indiana Statutes Annotated, 1951 Replacement, Vol. 11, Part 2, Sections 64-2601 to 64-2635, both inclusive.

Jurisdiction

The issue of alleged interstate commerce immunity with respect to income derived as hereinabove alleged, was raised in the Court of first instance in the Marion Superior Court of Marion County, Indiana, by the filing of respondent's complaint (paragraph one (1) thereof) (R. p. 2), to which the petitioner filed its answer of denial (R. p. 8).

The Court of first instance, upon the hearing and conclusion of evidence and submission of the cause, entered its Special Findings of Fact and Conclusions of Law, and judgment thereon against petitioner, that the income herein was immune from taxation by virtue of the Commerce Clause (R. p. 39).

The question of alleged interstate commerce immunity was pursued by petitioner from the Court of first instance by the filing of petitioner's Motion for New Trial, which was overruled by said Court; thereafter, the question of alleged interstate commerce immunity was pursued and submitted to the Indiana Supreme Court by the filing of the Transcript of the Record, together with petitioner's Assignment of Errors (R. p. 1). After briefing and argument, the Indiana Supreme Court, on March 19, 1953, entered its written opinion, decision and judgment, which was based solely on the question of interstate commerce immunity, in which said opinion it concluded as follows:

> "In the case at bar the tax sought to be recovered was levied upon the gross receipts of appellee from interstate commerce transactions within and without the State of Indiana. A tax upon the gross receipts from such commerce is, in effect, a tax upon the commerce itself, and, as such, interferes with and burdens such commerce in proportion to the amount of the tax levied. If Indiana can tax the gross receipts derived from the commerce here in question, simply because they are income from activities which are in interstate

commerce, then the State of Ohio may also tax the same receipts for the same reason.

The free flow of commerce across state lines is a vital and indispensable part of the economic life and political existence of our country. A tax upon the gross receipts derived from activities in interstate commerce affects each transaction in proportion to its size and without regard to whether or not it is profitable. It is entirely possible that such a tax may be sufficient to make the difference between profit and loss, or to so reduce the profit as to impede or discourage the conduct of commerce.

The tax levied against appellee herein is a direct tax upon the gross income (receipts) derived from sales in interstate commerce and, as such, directly burdens, and interferes with, the free flow of such commerce, between the State of Ohio and the State of Indiana and is invalid as being in conflict with Article I of Section 8 of the Constitution of the United States.

It is argued that a different situation maintains than that present in the J. D. Adams Mfg. Co. v. Storen, 1938, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, supra, and Freeman v. Hewit, 1947, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, supra, cases because the goods in this case were shipped into Indiana instead of being shipped from Indiana to another state.

When goods or chattels are shipped from one state to another, it is interstate commerce and the direction of the flow does not change that characteristic. The imposition of a tax on the gross receipts of such commerce is no less a burden thereon, or interference therewith, because such receipts are taxed by the state into which the commerce flows rather than by the state of its source. Fargo v. Stevens, 1887, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888, 892, supra; Philadelphia, etc., Mail Steamship Co. v. Pennsylvania, 1887, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200, 1202, supra.

The transactions herein being interstate commerce and a tax upon the gross receipts therefrom being an

unconstitutional burden upon such commerce, the judgment of the lower court should be affirmed.

Having reached this conclusion it is not necessary to consider the other questions raised by the briefs, or to consider appellee's cross errors.

Judgment affirmed."

(111 N. E. (2d) at p. 70).

Thereafter, and within the time allowed by the Rules of the Supreme Court of Indiana, the petitioner herein filed its petition for rehearing of said opinion, decision and judgment, which said petition was denied by the Indiana Supreme Court on April 21, 1953 (R. p. 88). The opinion, decision and judgment of the Indiana Supreme Court was rendered by the highest Court of the State of Indiana from which a decision could be had and is a final judgment, subject to no further review or correction in any other state tribunal.

The issue in this case and the holding of said Court, of which review is sought by this Honorable Court, draws in question the validity of a state statute on the grounds of its being repugnant to the United States Constitution, viz.: The Commerce Clause, Article I, Section 8, Clause 3.

The statutory provisions believed to sustain the jurisdiction of this Honorable Court are: Section 1257 (3) and Section 2101 of Title 28 of the U. S. Code Annotated.

The Questions Presented

I

Is respondent, a foreign corporation, not qualified to do business in Indiana and having no place of business in Indiana, which manufactures intricate furnaces at its Ohio plant, immune from Indiana's Gross Income Tax by virtue of the Commerce Clause, upon income derived from sales of said furnaces to Indiana purchasers, when the consum-

mation of the sales were dependent wholly upon necessary assembly and/or adaption and adjustment by respondent's factory trained engineers, supervisors and workmen, at the Indiana plant of the purchaser?

II

Does the fact that respondent, a non-resident, manufacturing intricate furnaces in Ohio, wholly consummates the sale of said furnaces of necessity by assembly and/or adaption and adjustment in Indiana, resulting in personal property, enjoy for tax purposes greater interstate commerce immunity than in the case of a non-resident manufacturing building materials outside Indiana, installing the same in Indiana, resulting in real property, the physical activities and performance in Indiana in each case being the same?

III

Does the fact that the assembly and/or adaption and adjustment under the facts herein, as performed by respondent's skilled workmen at the plant site of the purchaser in Indiana, create interstate commerce immunity greater than in the case of assembly and/or adaption and adjustment of non-intricate machinery by common labor?

IV

Does the fact that respondent, a non-resident seller of intricate machinery requiring assembly and/or adaption and adjustment at the Indiana plant of the purchaser, is not required to qualify to do business in Indiana, necessarily forbid the taxation of income from sales, the consummation of which were wholly dependent upon the physical presence and performance of respondent's workmen to assemble and/or adapt and adjust the furnaces in Indiana?

V

Under the circumstances herein, does the Commerce Clause preclude the State of Indiana from taxing that portion of respondent's income derived from labor performed in Indiana, averaging 13.5% of the sales price of the machinery?

Petitioner's Specification of Errors

The Supreme Court of Indiana erred:

1. In holding that respondent's income from the sale of intricate machinery, wholly consummated in Indiana by necessary assembly and/or adaption and adjustment performed in Indiana, the taxing state, is immune from taxation by virtue of Article I, Section 8, Clause 3 of the Federal Constitution, the Commerce Clause.

2. In holding that:

> "The imposition of a tax on the gross receipts of such commerce is no less a burden thereon, or interference therewith because such receipts are taxed by the state into which the commerce flows, rather than by the state of its source,"

when the sales giving rise to such gross receipts were wholly dependent upon consummation by respondent in Indiana by its necessary physical presence and performance in Indiana to assemble and/or adapt and adjust.

3. In holding that the taxation of the gross receipts from respondent's sales is invalid, when the gross income producing event was consummated wholly in Indiana, the taxing state, at the final stage of an interstate movement by assembly and/or adaption and adjustment performed by respondent in Indiana.

4. In holding, in effect, that the necessary assembly and/or adaption and adjustment by a non-resident in Indiana resulting in personal property enjoys inter-

state tax immunity greater than in the case of necessary installation of building materials by a non-resident in Indiana resulting in real property, the physical Indiana activities in each case being the same.

5. In holding, in effect, that the skilled technical activities of a non-resident in Indiana, enjoy interstate tax immunity greater than in the case of unskilled activities by a non-resident in Indiana.

6. In erroneously concluding that the larger furnaces shipped into Indiana in component parts and there assembled, adapted and adjusted, were not created or brought into existence in Indiana, contrary to Findings of Fact accepted by it.

7. In holding that Indiana may not tax that portion of respondent's income herein derived from labor performed in Indiana, said Indiana labor income averaging 13.5% of the average sales price.

Reasons Relied upon for the Allowance of the Writ

The final opinion, decision and judgment of the Indiana Supreme Court in this case, rendered by the highest court of the State of Indiana in which a decision could be had, draws in question the validity of a state statute solely on the ground of its being repugnant to the Federal Constitution, viz: the Commerce Clause. Said Court has decided a federal question of substance not heretofore determined by this Court, in a way probably not in accord with applicable decisions of this Court and in conflict with important decisions of other state courts upon similar, if not identical, facts.

1. The Supreme Court of Mississippi has held in the case of *Stone* v. *York Ice Machinery Corp.*, (1942) 10 So. (2d) 380, that income such as respondent's is subject to its gross income tax. In this case, York Ice Machinery Corporation was a non-resident of Mississippi and was not qualified to do business in that state. Its business was that of furnishing and installing machinery and equipment for air-condi-

tioning of buildings in Mississippi. The installation there required the labor of skilled workmen; the cost of installation varied from seven to twelve per cent of the total contract price. The Supreme Court of Mississippi allowed the imposition of its 1% gross receipts tax upon the entire proceeds from the contract, notwithstanding the contention that the assembling, installation and testing was a highly relevant and appropriate part of the sale, requiring the services of skilled experts and was essential to the completion of an interstate business.

The Indiana Supreme Court has attempted to distinguish this case by concluding that York Ice Machinery Corporation, *supra,* was engaged in a building or construction contract; (111 N. E. (2d) 54); that the attempted distinguishment of the Indiana Supreme Court of the York Ice Machinery Corp. case is factually erroneous is evidenced by the following quotation from the opinion of the Mississippi Supreme Court:

> "Where such a substantial portion of the contract for the *sale,* installation, adjustment and testing of the air-conditioning systems involved in this case was performed in this state, as a condition precedent to its final acceptance by the purchaser, in the exercise of a local activity to the extent disclosed by the declaration in this case, the contention of the appellee as to its nonliability for the taxes in question, if sustained, would work an unjust discrimination against those residing in this State who may undertake to manufacture and install machinery and equipment in connection with many of the projects enumerated by the statute and also where the materials for any such projects are ordered and shipped in interstate commerce from manufacturers out of the State and assembled and installed by local residents who may be engaged in the business of contracting in this State and liable for the taxes in question. In our opinion the tax here imposed has equality as its theme and that the statutes in ques-

> tion apply to the activity in which the appellee is here engaged." (Emphasis ours.)
> 10 So. (2d) 380 at p. 385.

This language of the Mississippi Supreme Court clearly indicates that it considered the activity of York Ice Machinery Corporation as that of *selling*, installing, adjusting and testing, rather than constructing.

In view of this fact, we believe that the York Ice Machinery case (10 So. (2d) 380) construed with the opinion of the Indiana Supreme Court in the Surface Combustion case herein, will result in conflict and confusion among the States upon what we believe to be similar, if not identical, facts. These two cases are substantially indistinguishable.

2. On February 26, 1951, in the case of *Norton Company* v. *Department of Revenue*, 340 U. S. 534, with respect to incoming interstate sales, this Court held that where local services rendered in the destination state were decisive factors in establishing and holding the market, that such local services were sufficient to attribute the income to the state in which such services were performed, for this Court stated:

> "Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market." 340 U. S. at p. 538.

In the *Surface Combustion* case herein, the Findings of Fact conclusively demonstrate that the physical presence of respondent's workmen in Indiana, was indispensable in establishing and holding this market. If it were not for the presence of respondent's workmen in Indiana to assemble and/or adapt and adjust its furnaces at the Indiana plant of the customer, it could not hold this business. So important were the local Indiana events of assembly and/or

adaption and adjustment at the Indiana plant of the customer, that delivery, acceptance, payment and passage of title were wholly dependent upon performance by physical presence in Indiana. The relation to the destination state was not slight as in the case of the itinerant drummer.

3. On December 6, 1937, in the case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, with respect to the construction of locks and dams in West Virginia, this Court held (302 U. S. 158) that the contractor's activities at the dam sites were local and sufficient to support the imposition of a West Virginia gross sales and income tax.

In the Dravo case, the contractor's income was held to be tax immune only in situations in which roller gates and appurtenant equipment were preassembled outside of West Virginia, inspected, tested and accepted by the purchaser outside of West Virginia, payment made outside West Virginia and stored outside West Virginia until delivered. Such was the basis upon which Dravo's income was segregated as between taxable and non-taxable income in 114 Fed. (2d) 242, in conformity with this Court's opinion. Certiorari denied 312 U. S. 678.

In the Surface Combustion case herein, not only is there local assembly in Indiana like the Dravo case, but unlike the Dravo case, testing, inspection, delivery, acceptance, payment and passage of title were each wholly dependent upon the performance of respondent's contract at the Indiana plant of the customer by means of assembly and/or adaption and adjustment. Throughout the *Surface Combustion* case herein, the respondent has contended and the Indiana Supreme Court held that there is a distinction between construction contracts and contracts requiring assembly and/or adaption and adjustment resulting in tangible personal property. However, in each, the necessity of the contractor's physical presence at the job site, is identical.

Just as it is not practicable to ship buildings as a unit, it is not practicable to ship the larger Surface Combustion furnaces as a unit. The reason for shipping either in component parts is because of the impracticability of shipping the whole unit. We respectfully urge that in either the construction or the assembly contract, physical presence in the State of performance is a sufficient local activity to support the imposition of the tax; the fact that the construction contract results in a building permanently anchored to the ground, whereas the Surface Combustion contract results in a chattel bolted to a cement foundation, is, we believe, of no constitutional significance.

As in the case of *Freeman* v. *Hewit* (1946) 329 U. S. 249, where the Court applied the Commerce Clause with equal force whether the sales were of tangible or intangible property, we believe that the Commerce Clause applies with equal force whether the local performance of the contract results in a building or a machine. In either event, physical presence in the state of performance and the necessary activities therein, are identical. As stated by this Court, we believe that the Commerce Clause should be interpreted in a practical rather than technical manner.

4. We cannot seriously believe that this Court would concur in the statement of the Indiana Supreme Court that:

> "If Indiana can tax the gross receipts derived from the commerce here in question, simply because they are income from activities which are in interstate commerce, then the State of Ohio may also tax the same receipts for the same reason."
>
> 111 N. E. (2d) at p. 70.

An application of the case of *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, will establish conclusively that the State of Ohio cannot tax respondent's receipts herein. Not only is the commerce outgoing so far as Ohio

is concerned, but assembly, and/or adaption and adjustment are in Indiana; delivery, inspection, acceptance, payment and passage of title, are each wholly dependent upon necessary activities performed by respondent's workmen in Indiana. In our opinion, in view of the circumstances of this case, the absence of the right of Ohio to tax respondent's gross income herein, is even more self-evident than in the *Adams* case. If the *Adams* case has any force whatsoever, it would establish conclusively the proposition that respondent's income herein is not subject to a multiple tax burden.

In this connection, it should be noted that all other regulatory characteristics are absent herein. In accord with the case of *York Mfg. Co.* v. *Colley,* (1918) 247 U. S. 21, and because the intricate nature of the furnaces herein sold required assembly and/or adaption and adjustment in Indiana, the respondent has not been required to qualify nor be licensed in Indiana. To that extent, the State of Indiana has recognized the interstate nature of respondent's business. Respondent has never been denied the use of Indiana courts simply because it was not qualified to do business in Indiana, nor was that question ever raised in this litigation. The record bespeaks just the opposite, the respondent using Indiana courts in this litigation without question. In view of the foregoing, we believe that there is no actual nor possible burden on, discrimination against, interference with or regulation of the commerce herein.

5. Since, as we believe, there are no elements of regulation present herein, respondent's Indiana activities are as much local events sufficient to support the tax as the act of use or consumption at the end of an interstate movement, which this Court has held sufficient to support a use tax in such cases as *Felt & Tarrant* v. *Gallagher,* (1939) 306 U. S. 62; *McGoldrick* v. *Felt & Tarrant* (1940) 309 U. S. 70,

and *McGoldrick* v. *Berwind-White Co.* (1940), 309 U. S. 33. If, as stated by this Court in *Swift & Co.* v. *U. S.* (1905), 196 U. S. 375, and many times thereafter, "the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it," then, we believe that the income as derived under the circumstances of the Surface Combustion case herein, may be taxed constitutionally, since there is no actual or possible regulation of the commerce.

6. We believe that the Indiana Supreme Court has decided the *Surface Combustion* case herein upon an erroneous conclusion of fact in direct opposition to Special Findings of Fact approved by it, for the Indiana Supreme Court has stated that there is no evidence that the furnaces were created or brought into existence in Indiana. (111 N. E. (2d) at p. 62).

Special Finding of Fact No. 39 is as follows:

> "Where local assembly was required, the company assembled said furnaces at the plant of the customer in the State of Indiana. The company adjusted each of said furnaces for operation at the plant of the customer in the State of Indiana." (R. p. 37.)

Special Finding of Fact No. 40, states:

> "Upon completion of such assembly, if any, and such adjustment, acceptance by the customer and payment in full of said purchase price, the company delivered said furnace to said customer and title to said furnace passed to said customer." (R. p. 37.)

With respect to the larger furnaces which were shipped into Indiana in component parts, said Findings show conclusively that the component parts which were manufac-

tured in Ohio were not in a deliverable state as a complete furnace upon arrival at the Indiana plant of the customer. It was not delivery of component parts which respondent's contract required; rather it was the delivery of a complete furnace. Therefore, with respect to the larger furnaces shipped in component parts, they *were* created and brought into existence in Indiana, and only after such assembly, adaption and adjustment did they become a complete furnace which the Indiana purchaser would be required to accept. Since the Indiana Supreme Court accepted the Special Findings of Fact found by the trial court, we believe that its erroneous conclusion of fact should not prevail when in direct opposition to the Special Findings of Fact. We respectfully believe that with respect to the larger furnaces assembled in Indiana of necessity, that no other conclusion can be reached but that they *were* created and brought into existence in Indiana.

7. Although the entire receipts herein are subject to Indiana's Gross Income Tax Law, the Indiana Supreme Court further erred in holding that that portion of respondent's income from its Indiana activities, is not subject to the tax. The Indiana activities of assembly, and/or adaption and adjustment are not those simple, slight, and brief services performed by sellers of chattels, such as electric typewriters, comptometers and business machines, in which a representative of the seller, in a few hours or less, sets up and adjusts the machinery. Here, on the contrary, Special Finding of Fact No. 29 discloses that not just one representative of the respondent was in Indiana, but that it employed factory trained engineers, supervisors and workmen who performed the service of assembly and/or adaption and adjustment at the Indiana plant of the purchaser. Finding No. 30 discloses that the average price for said furnaces was $30,240.00. (R. p. 34.)

Finding No. 29 discloses that the average expense of this labor engaged in such work at the Indiana plant of the customer, was 13.5% of the purchase price, wholly local Indiana labor income. (R. p. 34.)

On June 14, 1948, in the case of *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653 this Court held that that portion of the income of an interstate carrier based upon mileage within the taxing state, was subject to a gross receipts tax as against the contention that none of its income was taxable because it was engaged in the business of interstate transportation. This Court stated at 334 U. S. 663:

> "However, while the New York Courts have construed the statute as levying an unapportioned gross receipts tax on this transaction, the entire tax need not fall. The tax may be 'fairly apportioned' to the 'business done within the state by a fair method of apportionment'. Western Livestock v. Bureau of Revenue, 303 U. S. 250, 255. There is no dispute as to feasibility in apportioning this tax."

In effect, the rule of apportionment was applied in the case of *James* v. *Dravo Contracting Co.* (1937), 302 U. S. 134; 114 Fed. (2d) 242, Certiorari denied 312 U. S. 678, in connection with the income of Dravo from the construction of locks and dams in West Virginia. Because the roller gates and appurtenant equipment were preassembled, inspected, accepted and stored outside of West Virginia until delivery, this Court held that, to that exent, the source of such income was without the jurisdiction of the taxing state. (Here, of course, assembly, adaption, adjustment, inspection, acceptance, payment and passage of title all occurred in Indiana, supporting the taxability of the entire receipts). However, the Dravo case, in effect, allowed the imposition of West Virginia's gross receipts tax to that portion of the income derived at the dam sites. We insist that there

is as much right to tax respondent's income apportioned to its Indiana activities, as the right of West Virginia to tax the gross receipts of Dravo from its local activities at the dam sites in West Virginia.

However, the Indiana Supreme Court in this case, like the New York Court of Appeals in the *Central Greyhound Lines* case, has said:

> "The Gross Income Tax Act makes no provision for an apportionment of the tax, but even if it did, the activities in the case at bar, which appellants are attempting to tax, are wholly in interstate commerce, and since the entire gross receipts which appellee receives from these activities are receipts wholly from interstate commerce, there is no basis for an apportionment, even if one were provided."
> (111 N. E. (2d) at p. 64).

As opposed to this statement of the Indiana Supreme Court, Section 6 (a) of the Gross Income Tax Law, Burns' Indiana Statutes Annotated, (1951 Replacement) Volume 11, Part 2, Section 64-2606(a), excepts from application of the Act "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States * * *, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America."

If apportionment of interstate commerce receipts for taxation purposes is proper, as indicated by the *Central Greyhound Lines* and the *Dravo* cases, *supra*, then this language of the taxing act, though not in positive terms, is an indirect permission for the application of the apportionment theory. In practical effect, the language of the statute imposes the tax, subject only to the constitutional prohibition of the Commerce Clause as interpreted by this Court.

Conclusion

We respectfully submit that the issue in this case is new and unique insofar as decisions and opinions of this Honorable Court are concerned. The facts are peculiar in that physical presence and performance in Indiana are in all instances required, in some instances merely to adapt and adjust, yet in other cases to create by assembly as well as adapting and adjusting. Upon these physical Indiana activities wholly depend delivery, acceptance, payment and passage of title. Yet, because of the intricate nature of the machinery sold herein, the assembly and/or adaption and adjustment in Indiana, are necessary elements in the completion of an interstate sale to the extent that the respondent is not required to qualify to do business in Indiana. Notwithstanding this, the benefits, protection and opportunities afforded respondent, are not less than if it were qualified to do business in Indiana.

In view of the increasingly complicated age in which we are living, there is a definite trend toward the development and sales of many other types of equipment which are becoming more and more specialized, and of necessity must require physical presence and major activities of the seller in the state of the purchaser.

If the opinion of the Supreme Court of Indiana is allowed to stand without review, there is no reason why it may not be extended to sales of increasingly numerous other types of equipment for example, the sale and assembly of catalytic cracking plants at petroleum refineries, and the sale and assembly of technical electronic and television equipment, which may be said to be sales rather than construction contracts. Where the seller of such equipment is of necessity present in the State of the purchaser to perform major activities there, necessary to consummate the sale, we do

not believe that the commerce clause was ever intended to immunize such income from state taxation.

WHEREFORE, your petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, that review of the case herein be made by this Honorable Court, and that the opinion, decision and judgment of the Indiana Supreme Court be in all things reversed, and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General,
State of Indiana;
JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
EARL E. SCHMADEL,
GEORGE B. HALL,
Deputies Attorney General,
State of Indiana,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 262.

GROSS INCOME TAX DIVISION, INDIANA DEPARTMENT OF STATE REVENUE, STATE OF INDIANA, et al.,
Petitioners,

vs.

SURFACE COMBUSTION CORPORATION,
Respondent.

On Petition for Writ of Certiorari.

BRIEF

For the Respondent in Opposition.

ARTHUR L. GILLIOM,
ROBERT D. ARMSTRONG,
ELBERT R. GILLIOM,
RICHARD L. GILLIOM,
1340-1344 Consolidated Building,
Indianapolis 4, Indiana,
Counsel for the Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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vs.

SURFACE COMBUSTION CORPORATION,
Respondent.

On Petition for Writ of Certiorari.

BRIEF

For the Respondent in Opposition.

OPINION BELOW.

The opinion of the Supreme Court of Indiana appears in the printed record (R. 49-86) and is reported in 111 N. E. (2d) 50. The same opinion covered the companion case to which the petition in No. 261 is addressed.

JURISDICTION.

The judgment of the Supreme Court was entered on March 19, 1953 (R. 49), and the petitioners' petition for rehearing was denied on April 21, 1953 (R. 88). Time for filing a petition for a writ of certiorari was extended on July 13, 1953, to August 20, 1953 (R. 94). The petition was filed on August 14, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

Whether the Supreme Court of Indiana properly held invalid, as being in conflict with the Commerce Clause in Section 8 of Article I of the Constitution of the United States, the assessment and collection by the petitioners of the Indiana gross income tax on the gross receipts from sales of chattels personal in interstate commerce.

STATUTE INVOLVED.

The pertinent parts of the Indiana Gross Income Tax Act are set out in the Appendix, infra. The Act excepted from the tax gross income derived from business conducted in interstate commerce "to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States. . . ."

STATEMENT.

The Supreme Court of Indiana affirmed a judgment rendered in this case by the Superior Court of Marion County of the State of Indiana in favor of the respondent for the recovery of amounts of Indiana gross income tax which the petitioners had assessed and collected on gross receipts from sales of industrial heat treating furnaces in interstate commerce. The State Supreme Court followed the decisions

of this Court in **J. D. Adams Mfg. Co. v. Storen** (1938), 304 U. S. 307, and **Freeman v. Hewit** (1947), 329 U. S. 249, that the Indiana gross income tax as applied to gross receipts from sales of personal property in interstate commerce constitutes a direct burden on, and interference with, interstate commerce in violation of the Commerce Clause in Section 8, Article I, of the Constitution of the United States.

The decision of the Supreme Court of Indiana is based upon the special findings of fact made and filed by the trial court (R. 16-37, 41-42). The facts in so far as they are relevant to the issues presented by the petition may be summarized as follows:

The respondent is a corporation organized under the laws of Ohio and has its office and place of business in the City of Toledo, Ohio, where it is engaged, as its predecessors in interest had been, in the business of manufacturing and selling industrial heat treating furnaces. The respondent is the assignee of the refund claims of its predecessors herein sued upon. The respondent and its predecessors in interest are in the special findings collectively designated as "the Company" (Findings 1-7, R. 16-18). The manner in which the sales in question were made and consummated was always the same under each successive ownership of the business, so that said collective designation, "the Company", is appropriate and will likewise be used in this summary.

The petitioners are the state agencies and officers of Indiana charged with the administration of its Gross Income Tax Act. They and their predecessors are in the special findings collectively referred to as "the Department" (Findings 8-10, R. 18-19).

The Department made the assessment involved in this case notwithstanding its legal department had previously issued a ruling in a letter to the Company dated January

11, 1935, that its sale transactions with purchasers in Indiana were "made in interstate commerce and for that reason there is incurred no gross income tax liability under the provisions of the Gross Income Tax Law" (Finding 13, R. 22-23).

Neither the respondent nor any of its predecessors in interest, designated as "the Company", was ever a resident of Indiana, or ever maintained any warehouse or manufacturing plant in Indiana, or ever had any solicitor, agent, or officer in Indiana with authority to enter into contracts there. The Company's office, place of business and factory were at all times located in the City of Toledo, Ohio (Findings 1-6, R. 16-18).

The industrial heat treating furnaces which the Company manufactured and sold and which were the subjects of the sales in question are complex furnaces used in the manufacturing industry for effecting desired metallurgical or chemical changes in castings and metal parts, used in automobiles, machinery, and other articles, through the application of various heat treating processes (Finding 22, R. 32). The furnaces produced heat by combustion of a mixture of gas and air. The combustion process was performed by an intricate system of air blowers, recirculating air heaters, drums, draft ducts, ventilating flues, manifolds, pipes, valves and other devices which were a part of the furnace. They contained mechanisms for mixing the fuel and the air in the proper proportions to produce the type of combustion necessary for a particular heat treating process and for controlling temperatures, atmospheres and time cycles as required thereby, and contained moving parts and mechanisms for the purpose of conveying the material through the furnace for heating and cooling, including conveyors, motors and bearings. With respect to the conveyor mechanism, the principal types were (a) the car bottom furnaces, in which the material was loaded on a car which was pulled inside the heat chamber,

(b) the roller hearth furnaces, in which the material was placed on rotated rolls which conveyed it through the furnace, (c) the pusher type furnaces, in which the material was placed on trays which were automatically pushed through the furnace, (d) the chain or belt conveyor furnaces, in which the material was placed on slats which conveyed it through the furnace, and (e) the rotary furnaces, in which the hearth of the furnace automatically rotated with the material. The doors of the heat chamber were synchronized with the conveyor mechanism and were opened and closed automatically. The heating operations and the mechanical conveyor operations in said furnaces were automatically controlled, the controls being mounted on the control panel for the use of the operator. Said furnaces were commonly operated in unison with other machines in the production line, the material being brought to and taken from the furnace by conveyor mechanisms of the customer (Findings 24, 26, 42, R. 32-34, 41-42).

When the Company learned that a potential customer in Indiana was interested in acquiring one of these furnaces, it made a study of the customer's needs and selected a type of furnace engineered and designed for the desired heat treating process and adaptable to the needs of the customer. Thereupon the Company at its Toledo office prepared a "Proposal and Specifications" for the manufacture and sale of the selected type of furnace and transmitted it to the customer in Indiana for signature and return to Toledo where it was then accepted and signed by an executive officer of the Company and thereupon became a contract of purchase and sale (Findings 32-34, R. 35). Each contract provided that the furnace therein described should be fabricated by the Company at its manufacturing plant in Toledo, Ohio, and be shipped from there direct to the customer in Indiana and there installed in working condition by th Company, all for a lump sum purchase price (Finding 35, R. 35-36). The amount expended by

the Company for salaries, wages and expenses of its factory trained employees while engaged at the plants of Indiana customers in the work of installing, testing and adjusting the furnaces averaged 13.5% of the purchase price of the furnace (Finding 29, R. 34).

These heat treating furnaces are in general use in the manufacturing industry. They are designed and manufactured in different types in order to apply different heat treating processes, and any of the furnaces could be moved after installation and use in one establishment to and used in another establishment employing the same particular heat treating process for which the particular furnace was designed (Finding 23, 26, R. 32-33). None of the furnaces was designed or manufactured with respect to any particular building or location. They were connected to the purchaser's premises only by means of nuts screwed to bolts imbedded in a concrete floor or foundation furnished by the purchaser and by means of water and gas pipe connections and electric wiring furnished by the customer (Finding 26, R. 33).

The furnaces were of different sizes and capacities. The smaller of them were fully assembled at the Company's plant at Toledo, Ohio, and were from there shipped by the Company in full assembled form direct to the customers at their plants in Indiana for installation and adjustment to the customer's needs. The larger furnaces would in fully assembled form be too large for transportation on railroad cars or motor trucks, and were therefore shipped by the Company in partially assembled form from Toledo, Ohio, to the customers at their plants in Indiana and were there fully assembled at the time of installation (Findings 27-28, R. 33-34). Both parties to each contract contemplated and intended at the time of entering into the contract that the furnace should be shipped interstate by the Company from Ohio direct to the customer in Indiana (Finding 37, R. 36).

Due to the complex mechanical nature of these furnaces, it was "necessary" that their installation and adjustment at the customers' plants in Indiana should be made by the Company's skilled factory trained engineers and employees in order to place them in satisfactory operating condition for performing their intended functions and to make possible the final delivery of them to the purchaser and the collection by the Company of the purchase price from the purchaser (Findings 43, 29, R. 42, 34). Each contract provided for this and provided for the payment by the purchaser of a "lump sum" purchase price for the furnace when so installed and adjusted (Finding 35, R. 35-36).

It was expressly found and stated in the special findings of fact that the furnaces "were machines performing a manufacturing function in industry and were and at all times remained chattel personal property" (Finding 31, R. 34); that each contract "was a contract for the purchase of chattel personal property and the sale of chattel personal property for a purchase price" (Finding 36, R. 36); and that "the performance of each of said contracts by the customer was a purchase of chattel personal property for a purchase price, and the performance of each of said contracts by the Company was a sale of chattel personal property for a purchase price" (Finding 44, R. 42).

The Company installed and adjusted each furnace at the customer's plant and thereupon title passed to the customer, as provided in the contract, and each Indiana customer paid the purchase price for the furnace to the Company at its Toledo, Ohio, office upon invoices sent from there (Findings 40-41, R. 37).

The Department assessed the Indiana gross income tax on all of the gross receipts so received by the Company in the years involved from its said sales of such furnaces to its Indiana customers (Finding 21, R. 32).

ARGUMENT.

This case is correctly decided on its own facts in complete harmony with the apposite decisions of this Court, and does not present any question warranting further review by this Court.

The decision of the case is based on the trial court's special findings of fact (R. 16-37, 41-42), which the state Supreme Court held were fully sustained by sufficient evidence (R. 51) and which it accepted as correctly found (R. 51). Upon those facts and on authority of this Court's decision in **York Mfg. Co. v. Colley** (1918), 247 U. S. 21, the Court correctly concluded that all of the transactions from which the gross receipts in question came "are clearly sales of personal chattels in interstate commerce and the installation and reassembling where required, were inherently a part of, and a necessary incident to, the sale" (R. 71). And upon the facts in the special findings and on authority of this Court's decisions in **J. D. Adams Mfg. Co. v. Storen** (1938), 304 U. S. 307, and **Freeman v. Hewit** (1947), 329 U. S. 249, the Court correctly concluded that the levy of the Indiana gross income tax upon these gross receipts "is a direct tax upon the gross income (receipts) derived from sales in interstate commerce and, as such, directly burdens, and interferes with, the free flow of such commerce," in violation of the Commerce Clause in Section 8 of Article I of the Constitution of the United States (R. 85).

The subsidiary question whether the transactions here involved constituted interstate commerce, and the main question whether the Commerce Clause prohibited the imposition of the Indiana gross income tax on the gross receipts derived from these transactions were the only two federal questions decided by the Supreme Court of Indiana. Eighteen pages of the Court's opinion are de-

voted to the consideration and decision of said subsidiary question (R. 54-71), and fourteen pages of the opinion are devoted to the consideration and decision of said main question (R. 71-85). The opinion correctly summarizes the special findings of fact (R. 52-53), and carefully reviews and correctly distinguishes the cases on which the parties rely for their respective positions on each of those questions (R. 54-85). It is manifest from this exhaustive and able opinion that both of these questions were correctly decided upon authority of ruling decisions of this Court.

In **York Mfg. Co. v. Colley**, supra, this Court established a clear cut precedent for the correct decision of said subsidiary question in the instant case. In that case this Court applied to a transaction, similar to the transaction here involved, the well established principle which it restated as follows: "that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled to the protection of the Constitution of the United States resuling from that relation." In that case the contract provided for the sale of a complex ice making plant, guaranteed to produce three tons of ice a day, to be shipped in parts from Pennsylvania to the purchaser's place of business in Texas, and there to be "erected and connected" and submitted to practical test in operation under supervision of an engineer to be sent there by the seller at a per diem charge to the purchaser. The parts to be shipped and then erected and connected consisted of "gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator, and other machinery and accessories, including apparatus for utilizing exhaust steam for making distilled water for filling the cans." The assembling and installation of the parts and the practical testing of the plant in operation were necessary "before the obligation to finally receive it would arise." This Court held that the

contract was one "inherently relating to and intrinsically dealing with the thing sold,—the machinery, and all of its parts constituting the ice plant." The Texas courts had concluded that the assembling and installation of the parts and the practical testing of the installed ice making plant in Texas were wholly separable from the interstate transaction, and that the seller had in that respect engaged in local business in Texas without obtaining a state permit as a foreign corporation and could therefore not maintain an action in the courts of Texas to recover the purchase price for the ice plant. This Court, however, reversed on its conclusion that, under application of the foregoing principle to the particular contract and the facts before the Court, these activities in Texas were immediately and inherently connected with the intrinsically interstate sale transaction and were an inseparable part thereof.

The decision in **York Mfg. Co. v. Colley,** supra, is clearly apposite here in view of the similarity of the essential features of the sales contracts in the two cases, and the similar necessity in them that the installation and testing of the complex things sold had to be done under supervision of specially trained and skilled engineers and employees in order to make acceptance by and delivery to the purchaser possible. Finding 35 (R. 35-36) shows that each of the contracts provided for the fabrication of the furnace by the seller at Toledo, Ohio, for its shipment from thence to the purchaser in Indiana, for its installation and adjustment by the seller at the purchaser's plant and for passage of title to the furnace from the seller to the purchaser upon full payment of the stipulated "lump sum" price "on or after the complete assembly and adjustment of said furnace." The special findings show that these industrial heat treating furnaces were no less complex in nature than the ice making plant in the **York Mfg. Co.** case, and that in order to make the sale, delivery and receipt of the purchase price possible it was necessary that the seller install

them in satisfactory operating condition at the customer's plants (Findings 23-29, 42-43, R. 32-34, 41). The smaller of the furnaces were completely assembled at the seller's plant in Ohio and were shipped and installed in fully assembled form. The larger furnaces were shipped in partially assembled form, due to the inability of railroad cars or trucks to carry their size and weight in fully assembled form, and were fully assembled and installed at the customer's plants (Findings 27-28, R. 33-34). In accordance with the contracts the furnaces were fabricated completely in Ohio, shipped from thence directly to the customer in Indiana and there installed (Findings 37-39, R. 36-37). Upon their "acceptance by the customer and payment in full of the purchase price, the Company delivered said furnace to said customer, and title to said furnace passed to said customer" (Finding 40, R. 37). It is expressly found in Finding 44 (R. 42) that "the performance of each of said contracts by the Company was a sale of chattel personal property for a purchase price." It is thus plain that the decision in **York Mfg. Co. v. Colley**, supra, is apposite and is clear authority for the conclusion reached by the Supreme Court of Indiana on said subsidiary question.

The gross receipts here in question having plainly been received by the seller directly from the purchasers in payment of the "lump sum" purchase prices for the furnaces sold directly by the seller to the purchaser in exclusively interstate commerce, the main question, whether the imposition of the Indiana gross income tax upon these receipts is repugnant to the Commerce Clause in Section 8 of Article I of the federal Constitution, is ruled by this Court's decisions in **J. D. Adams Mfg. Co. v. Storen**, supra, and **Freeman v. Hewit**, supra. Those cases were appeals from decisions by the Supreme Court of Indiana, and in both of them this Court held that the imposition of this same Indiana gross income tax upon the gross receipts received in payment of the purchase prices of personal

property sold and transported in interstate commerce is prohibited by the Commerce Clause. On authority of those cases the Supreme Court of Indiana correctly concluded that the tax assessed and collected in the instant case offended the Commerce Clause and is invalid.

None of the reasons, numbered 1-7, advanced in the petition (Pet. 11-20) for allowance of a writ of certiorari justifies issuance of the writ. These are discussed here in the order in which they appear in the petition.

1. The first reason given for allowance of the writ is the claim that the decision of the Supreme Court of Indiana is in conflict with the decision of the Supreme Court of Mississippi in **Stone v. York Ice Machinery Corp.** (1942), 10 So. (2d) 380, on the question whether the sale transactions in the instant case were transactions in interstate commerce. The petitioner's claim that this "will result in conflict and confusion among the States upon what we believe to be similar, if not identical, facts" (Pet. 13). The opinion of the Supreme Court of Indiana clearly distinguishes the Mississippi case from the instant case on the basis of the difference in the facts of the two cases (R. 48-49). Both opinions refer to this Court's decision in **York Mfg. Co. v. Colley,** supra, and they do not differ as to its meaning. The Indiana Supreme Court points out the factual similarities rendering that decision apposite to the instant case, whereas the Supreme Court of Mississippi points out what it regarded as distinguishing factual dissimilarities rendering, in its opinion, the decision in the **York Mfg. Co.** case inapposite to the case before it. There clearly is no conflict between those two state cases **on any federal question.**

2. The second reason advanced in the petition is that the work of installing the furnaces at the customers' plants in Indiana should be regarded as the source of the gross receipts in question on the basis of **Norton Company v. De-**

partment of Revenue (1951), 340 U. S. 534, where the petition says "this Court held that where local services rendered in the destination state were decisive factors in establishing and holding the market, that such local services were sufficient to attribute the income to the state in which such services were performed" (Pet. 13). The "services" in Illinois to which this Court referred in that case had nothing to do with the installation and adjustment of the things sold as in the instant case and in the **York Mfg. Co.** case. In the **Norton Co.** case, a Massachusetts corporation qualified in Illinois to do a local business in that state in the sale and distribution of abrasive machines and supplies and for that purpose it operated a branch office and warehouse in Chicago. The branch office also performed services for Illinois customers by way of forwarding their orders for items, not in local stock, to the company's home office in Massachusetts and of delivering them after receiving them with other items shipped to the branch office in car load lots. The Court said that these services were related to the corporation's competition for local trade in Illinois and that the evidence did not relate them to interstate commerce as against local commerce.

We here point out that the petition ignores the phase of this Court's decision in the **Norton Co.** case that clearly is apposite. That case also involved exclusively interstate sales where customers in Illinois themselves placed orders directly with the corporation's home office in Massachusetts and where the goods were shipped from there directly to the customers in Illinois. As to those sales, this Court held that the income was not subject to the Illinois Occupation Tax, based on gross receipts. There is nothing in the **Norton Co.** case that affords a reason for allowance of the writ of certiorari in the instant case.

3. The third reason advanced is that on the basis of the decision in **James v. Dravo Contracting Co.** (1937), 302

U. S. 134, the gross receipts here in question should be held subject to the tax, because the petitioners cannot see any significance in the difference between the fact in that case that the materials shipped interstate were used in constructing a dam and locks in a river bed and became a part of the structure and the fact in the instant case that the chattel furnaces sold and transported in interstate commerce remained chattel personal property after they were bolted to the customer's concrete foundation. The contracts in the **Dravo** case are in no sense apposite here. That case was an appeal from a District Court three-judge decision, and it involved construction contracts between a Pennsylvania corporation, admitted in West Virginia for doing business, and the United States, as the other party, for the construction in West Virginia of locks and dams in two navigable streams. Certain lock gates and other parts used in the construction of the locks and dams were fabricated by the construction company at its plant in Pennsylvania and from there shipped to the construction sites in West Virginia where they were incorporated into the dam and lock structures. West Virginia imposed its gross income tax on all of the gross receipts received by the contractor under these construction contracts. The questions presented in the Supreme Court, in the words of the opinion, were:

> ". . . (1) whether the State had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden upon the operations of the Federal Government."

It was held that the construction sites were not under the exclusive jurisdiction of the United States and that West Virginia could tax the gross receipts derived from local activities on the construction sites within the territorial limits of that state, but **not** the gross receipts from the activities which the contractor carried on in Pennsyl-

vania in fabricating said lock gates and parts. The Court said:

> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly."

Following remand of the case by the Supreme Court, the District Court entered a decree apportioning the gross receipts "in accordance with the cost of work performed in the respective states," and both sides appealed from that decree to the Court of Appeals for the Fourth Circuit, where the decree was held erroneous and was reversed. **Dravo Contracting Co. v. James,** 114 F. (2d) 242, Cert. Den. 312 U. S. 678. The Court of Appeals held that the gross receipts could not validly be apportioned on a cost basis, and further held that the apportionment which the Supreme Court directed be made was meant to be the separation from the total gross receipts under the contracts of those amounts which Government paid **separately** for the lock gates and other items fabricated or acquired and stored in Pennsylvania until used, the title to which passed to the Government in Pennsylvania with the making of the payments. Those payments needed only to be totaled and the total subtracted from the total gross receipts in order to determine the portion thereof which had its source in West Virginia and the portion that had its source in Pennsylvania. The Court of Appeals remanded the case to the District Court with direction to enjoin collection of the tax on the portion of the gross receipts which the taxpayer derived "**from payments made upon deliveries or fabrication at its Pittsburgh plant** . . ." (emphasis supplied). The tax was allowed on the remain-

ing portion of the gross receipts—being the payments made for the work that was done strictly within the borders of West Virginia, which included the work of installing and incorporating **the Government's own lock gates and parts** in the dam and lock structures.

It is thus clear that the **Dravo** case did not apportion gross receipts from interstate commerce, but only segregated gross receipts from **intrastate** commerce in accordance with the separate payments that were made for what was done locally in the respective states of Pennsylvania and West Virginia, and it permitted West Virginia to tax only that portion which had its source exclusively within its borders. The case does not in any manner support petitioners' contention that the gross receipts in the instant case had their source in construction work in Indiana.

4. The fourth reason advanced is the claim that since, under the decision in **J. D. Adams Mfg. Co. v. Storen,** supra, Ohio could not tax the gross receipts in question, Indiana is permitted to tax them because no multiple taxation would result. This Court clearly did not mean by its decision in that case to say that only the state of origin is prohibited from laying such a tax on such gross receipts. The plain import of the decision and opinion in that case is that neither the state of origin nor the state of destination may lay a direct tax on the gross receipts from interstate sales. It was clearly so understood by Justice Rutledge who, in a footnote to his concurring opinion in **Freeman v. Hewit,** supra, said: "The Adams decision, of course, made no direct ruling upon an actual tax laid by the state of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of

origin, encountered'' (329 U. S. 249, 278). Moreover, as was pointed out hereinbefore, this Court held in **Norton Company v. Department of Revenue**, supra, that Illinois, as the state of destination, could not validly lay its Occupation Tax on the income received from sales which were clearly made in interstate commerce.

5. The fifth reason advanced is that the imposition of the Indiana gross income tax on the gross receipts in question did not amount to a regulation of or burden upon interstate commerce, assuming that the gross receipts were derived from interstate commerce. This is precisely contrary to the express decisions of this Court as to the effect of such imposition of this tax. In **J. D. Adams Mfg. Co. v. Storen**, supra, it was expressly said that ''We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution'' (304 U. S. 307, 311). And in **Freeman v. Hewit**, supra, it was expressly held that ''What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce'' (329 U. S. 249, 257).

6. The sixth reason advanced is that the petitioners ''believe that with respect to the larger furnaces, assembled in Indiana of necessity, that no other conclusion can be reached but that they were created and brought into existence in Indiana'' (Pet. 18). Such a conclusion is at complete variance with the facts in the special findings of fact. The findings show that the larger furnaces, the same as the smaller ones, were completely fabricated in Ohio and that the only reason they were transported in partially assembled form from Ohio into Indiana was because no railroad cars or trucks were large enough to transport them fully assembled. The completion of the assembling of the larger furnaces at the customer's plant in Indiana required less local activity than the assembling that was required

with respect to the ice making plant in the **York Mfg. Co.** case.

7. The seventh reason advanced is that the Supreme Court erred in deciding that the tax could not be laid on 13.5% of the sales price of the furnaces. There was no such question presented to or decided by the Supreme Court of Indiana. The Indiana Gross Income Tax Act does not provide for laying this tax on a portion of gross receipts from interstate commerce, and this was expressly pointed out by this Court in the **J. D. Adams Mfg. Co.** case. Nor did the petitioners attempt to make a levy either on 13.5% of the gross receipts or on any other portion thereof less than the entire amount of the gross receipts. The 13.5% figure was found in the special findings as the cost of the salaries and wages paid by the seller to its own employees while installing the furnaces in Indiana (Finding 29, R. 34). That cost figure was not found for the purpose of serving as a basis for apportionment of gross receipts. It was not contended by the petitioners in this case that they had made an assessment of the tax on only a portion of the gross receipts. The Supreme Court of Indiana clearly pointed out in its opinion that their contention was "that **all** of the income of appellee here involved was derived from the erection and installation in Indiana of one of its manufactured products; that the sources of the gross receipts upon which the tax here in question was levied were indivisible installment contracts for the fabrication, erection and installation of heat treating furnaces **'within the respective plants of customers in Indiana'**; and that **no part** of such income could have been derived from an activity connected with interstate commerce" (R. 54, Emphasis supplied).

The **Dravo** case, relied on by the petitioners for their present contention that a portion of the gross receipts in the instant case is subject to the Indiana Gross Income

Tax, does not support the contention. That case did not involve any gross receipts from interstate commerce. It involved only gross receipts from intrastate activities under construction contracts, some of which activities occurred in West Virginia and some in Pennsylvania, and involved only a separation of gross receipts in accordance with payments made by the Government separately for construction work done in West Virginia and for construction items furnished and delivered by the contractor to the Government in Pennsylvania.

The Commerce Clause, as construed and applied by this Court, does not permit state taxation of even an apportionate part of gross receipts received from exclusively interstate commerce, as was here the case. In **Spector Motor Service, Inc., v. O'Connor** (1951), 340 U. S. 602, this Court held that the Commerce Clause prohibited the collection of the Connecticut corporation franchise tax from a foreign corporation doing an exclusively interstate business, and said: "The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

CONCLUSION.

It is respectfully submitted that this case was correctly decided in harmony with the apposite decisions of this Court and that no valid reason appears in the petition for granting certiorari.

ARTHUR L. GILLIOM,
ROBERT D. ARMSTRONG,
ELBERT R. GILLIOM,
RICHARD L. GILLIOM,
Counsel for the Respondent.

APPENDIX.

Burns' Indiana Statutes Ann., Vol. 11, Part 2, Sections 64-2601 et seq.:

Section 64-2601 (m):

"The term 'gross income,' except as hereinafter otherwise expressly provided, means . . . the gross receipts of the taxpayer received from trades, businesses, or commerce, including admission fees or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, all receipts received from the performance of contracts, . . ."

Section 64-2602:

"**Levy of tax—Date.**—There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 64-2606:

"**Exemptions.**—There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America . . ."